

20 SEP 2005

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN THE MATTER OF:	:	CASE NUMBER
	:	
EARL RESPERT,	:	05-90606-WHD
	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 13 OF THE
DEBTOR.	:	BANKRUPTCY CODE

ORDER

Before the Court is a request by Ameriquest Mortgage Company (hereinafter "Ameriquest") for payment of attorney's fees in connection with a Motion for Relief filed by Ameriquest in the above-captioned bankruptcy proceeding. This matter constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(B).

FINDINGS OF FACT

The Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code on January 31, 2005. The Debtor's proposed Chapter 13 plan was confirmed on June 20, 2005. Ameriquest holds a security interest in real property known as 1583 Bagpipe Place, Conley, Georgia (hereinafter the "Property"). On April 18, 2005, Ameriquest filed a Motion for Relief from the Automatic Stay with regard to the Property. In its Motion, Ameriquest alleged that Earl Respert (hereinafter the "Debtor") had defaulted on his obligations under the promissory note. Specifically, Ameriquest stated that the Debtor had missed three post-

petition payments of principal and interest through the month of April 2005. Ameriquest sought relief from the automatic stay to permit it to foreclose on the Property and also requested attorney's fees pursuant to § 506(b) of the Bankruptcy Code.¹

On June 27, 2005, the Court held a hearing on Ameriquest's Motion. At that time, the parties indicated to the Court that the Debtor had been making post-petition payments, but that the payments made by the Debtor were not of the entire payment amount. Apparently, Ameriquest had received notice that the Debtor did not have insurance coverage for the Property. At that time, Ameriquest obtained force placed insurance and began adding 1/12 of the premium amount to the Debtor's payments to create an escrow to cover future insurance premiums. By the time Ameriquest appeared at the hearing, the only post-petition arrearage remaining was a "small" amount. However, Ameriquest was not willing to withdraw the Motion because the Debtor would not consent to paying Ameriquest's attorney's fees in the amount of \$800.

The Debtor asserted that the filing of the Motion in the first instance was unnecessary because, if Ameriquest had informed him that his payment amount had changed, he would have paid the correct amount. Ameriquest did not dispute that it did not notify the Debtor of the increase in the payment prior to filing its Motion. In response to the Debtor's argument, Ameriquest pointed out that the Debtor has been aware of the increased payment amount since at least May, but had continued to make his payments in the old payment

¹ On April 22, 2005, the Chapter 13 Trustee filed a response to Ameriquest's Motion, asserting that the Property may have substantial equity for the benefit of unsecured creditors.

amount. From the evidence proffered by counsel at the hearing, the Court is not clear as to whether the Debtor had actually failed to remit three post-petition payments at the time Ameriquest filed its motion or whether Ameriquest considered the Debtor to be in default on those three payments merely because he had failed to remit the additional insurance amount, which amounted to only \$25 per month. However, it is clear that, by the time of the hearing, the only outstanding post-petition amount due was \$125 to cover the insurance and a property inspection fee of \$45.

The total amount of the debt owed by the Debtor to Ameriquest is approximately \$71,000, and the value of the Property is approximately \$102,000 to \$106,000. Accordingly, the Property has about \$30,000 of equity. For this reason, the Court denied Ameriquest's motion for relief, but took under advisement its request for attorney's fees. Ameriquest is seeking payment of \$800 for the fees incurred in bringing the motion for relief and seeks to have the fees added to the pre-petition arrearage. The Debtor objects to having to pay the attorney's fees or the property inspection fee of \$45.

CONCLUSIONS OF LAW

I. Section 506(b) v. Section 1322(e)

The Debtor objects to the addition of attorney's fees to Ameriquest's arrearage on the basis that the filing of the motion was not necessary and, therefore, the fee is not reasonable.

Section 1322(e) controls the issue of whether Ameriquest is entitled to collect its fee as part of the amount necessary to cure the default of the mortgage through the Debtor's Chapter 13 plan.

Section 1322(b)(3) provides that a Chapter 13 plan may provide for the curing or waiving of a default, and section 1322(b)(5) provides that a Chapter 13 plan may provide for the curing of a default "within a reasonable time and maintenance of regular payments while the case is pending on any unsecured or secured claim on which the last payment is due after the date on which the final plan payment under the plan is due." 11 U.S.C. §§ 1322(b)(3); (b)(5). Pursuant to section 1322(e), "notwithstanding [sections 1322(b)(2), 506(b), and 1325(a)(5)], if it is proposed in a plan to cure a default, the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law." 11 U.S.C. § 1322(e). The "postpetition bankruptcy fees, incurred by [the mortgagee] prior to confirmation, constitute part of its arrearage claim and may be included in the amount required under the plan to cure the default." *In re McMullen*, 273 B.R. 558, 564-65 (Bankr. C.D. Ill. 2001); *see also In re Atwood*, 293 B.R. 227, 232 (Bankr. 9th Cir. 2003) (attorney's fees incurred by the mortgagee and provided for in the underlying agreement "are inherently part of the pre-petition claim, although contingent and although the services may have been rendered post-petition"); *In re Coates*, 292 B.R. 894 (Bankr. C.D. Ill. 2003) ("[F]ees and expenses become part of the claimed arrearage," the determination of which, section 1322(e) "directs inquiry not only to the terms of the

mortgage and note but also to applicable nonbankruptcy law.”); *In re Plant*, 288 B.R. 635 (Bankr. D. Mass. 2003) (“Thus, §§ 1322(e) applies with respect to interest, fees and costs to every contract effective after October 22, 1994, regardless of whether a particular claim is secured or unsecured, oversecured or undersecured.”).

Therefore, pursuant to section 1322(e), the lender’s attorney’s fees may be added to the cure amount if the fees are provided for in the agreement between the parties and are not prohibited by applicable nonbankruptcy law. *See In re Landrum*, 267 B.R. 577 (Bankr. S.D. Ohio 2001); *see also In re Shaffer*, 287 B.R. 898, 901 (Bankr. S.D. Ohio 2002) (finding that, because the fee provision within the promissory note was void under state law, section 1322(e) precluded the addition of preconfirmation attorney’s fees to the creditor’s arrearage claim, notwithstanding section 506(b)); *In re Taylor*, 2003 WL 22282173 (Bankr. D. Vt. Oct. 1, 2003) (“However, the fact that VHFA was not an oversecured creditor does not disqualify it from collecting attorney's fees under §§ 1322(e).”).

In this case, the Court cannot determine whether the agreement between the parties provides for the recovery of Ameriquest's fees in this instance, as neither the security deed nor the promissory note has been entered into evidence in this case. Accordingly, the Court cannot allow the requested fee to be paid as part of the arrearage at this time.

If Ameriquest is inclined to pursue the matter, Ameriquest should file its supporting documents, along with an affidavit establishing their authenticity. Additionally, Ameriquest shall file a memorandum of law addressing the issue of whether, in accordance with the

second prong of the section 1322(e) analysis, the fees sought would be prohibited by applicable nonbankruptcy law. Ameriquest may file the supplemental information on or before September 30, 2005, and, if such brief is timely filed, the Debtor shall file a response, along with any objection to the authenticity or admissability of the documentation, within fifteen (15) days of the date upon which the supplemental information is served upon the Debtor. Should Ameriquest fail to file the supporting documentation, the request for fees shall stand **DENIED** as of the date of the entry of this Order.

IT IS SO ORDERED.

At Atlanta, Georgia, this 19th day of September, 2005.

A handwritten signature in black ink, appearing to read "W. Homer Drake, Jr.", written over a horizontal line.

W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE